

No. 12755

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IN THE  
**United States**  
**Court of Appeals**  
FOR THE NINTH CIRCUIT

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FIREMAN'S FUND INSURANCE CO., a Corporation,  
*Appellant,*

vs.

JAMES G. MULROY, as Administrator of the Estate  
of Oscar Carl Johnson, Deceased, and UNITED  
STATES OF AMERICA,

*Appellees,*

JAMES G. MULROY, as Administrator of the Estate  
of Oscar Carl Johnson, Deceased,

*Appellant,*

vs.

FIREMAN'S FUND INSURANCE CO., a Corporation,  
UNITED STATES OF AMERICA,

*Appellees.*

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

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HONORABLE PEIRSON M. HALL, *Judge*

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**BRIEF OF APPELLEE**  
**UNITED STATES OF AMERICA**

---

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## INDEX

	Page
STATEMENT OF THE CASE.....	1
QUESTIONS PRESENTED.....	2
SUMMARY OF ARGUMENT.....	2
ARGUMENT .....	3
I. The Administrator of the estate of the insured may not sue for the proceeds of a policy which is payable to the insured's beneficiary .....	3
II. The United States is not liable on the Second Seamen's War Risk Policy since the deceased seaman was adequately protected by the policy issued by the Fireman's Fund Insurance Co. ....	7
III. The decisions of the War Shipping Administration under the authority lodged in it to determine coverage under Second Seamen's War Risk Policies involve the exercise of discretion and are not subject to review by the courts .....	10
CONCLUSION .....	15

## CASES

<i>Blake v. W. R. Chamberlin &amp; Co.</i> , 176 F. (2d) 511 .....	8, 9
<i>Crist v. United States War Shipping Administration</i> , 163 F. (2d) 145.....	9
<i>Dismuke v. United States</i> , 297 U.S. 167.....	12
<i>Fiamengo v. The San Francisco, et al</i> , 172 F. (2d) 767 .....	8
<i>Gordon v. United States</i> , 37 F. (2d) 925.....	5

	Page
<i>Hodges v. Standard Oil Company of New Jersey</i> , 123 F. (2d) 362 .....	8
<i>Lee v. United States</i> , 101 F. (2d) 472.....	5
<i>Silberschein v. United States</i> , 266 U.S. 221.....	12
<i>United States v. Boshar</i> , 91 F. (2d) 264.....	5
<i>United States v. Madison</i> , 300 U.S. 500 57 S. Ct., 566, 81 L. Ed. 767.....	6
<i>Virgin v. United States</i> , 165 F. (2d) 81.....	9

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**STATEMENT OF THE CASE**

The statement of the case in the brief of the  
appellant, Fireman's Fund Insurance Company, is  
an adequate presentation of the facts.

## QUESTIONS PRESENTED

1. Whether the finding of the court that the insured's death was due directly and proximately to a war risk within the coverage of the policy issued by the Fireman's Fund Insurance Company was clearly erroneous.

2. Whether the Administrator of the insured may bring suit against the United States under a Second Seaman's War Risk Policy.

3. Whether the decisions of the Administrator of the War Shipping Board under the automatic Second Seaman's War Risk Policy is final and conclusive.

## SUMMARY OF ARGUMENT

The Administrator of the estate of the insured has a cause of action against the Fireman's Fund Insurance Company which insured the deceased seaman against war risks. The court below held that the death of the insured was caused proximately by his imprisonment and hence within the coverage of the policy. There was ample evidence to sustain this finding.

The United States is liable, if at all, under the automatic insurance of the Second Seaman's War

Risk Policy, only if the Fireman's Fund Insurance Company's policy did not cover the seaman's death. In any event, the administrator of the estate of the insured has no capacity to sue the United States since the Second Seaman's War Risk Policy provides that the proceeds of the insurance may go only to certain named beneficiaries and prohibits payment to the insured's estate.

Finally, there can be no recovery against the United States since the Administrator of the War Shipping Board found that the beneficiary of the policy was not a dependent of the insured. Decisions of the Administrator are made final and conclusive by statute and the requirement of dependency is a reasonable one under automatic insurance and not arbitrary or capricious.

## ARGUMENT

### I

THE ADMINISTRATOR OF THE ESTATE OF THE INSURED MAY NOT SUE FOR THE PROCEEDS OF A POLICY WHICH IS PAYABLE TO THE INSURED'S BENEFICIARY.

The libellant herein is the administrator of the estate of Oscar Carl Johnson, the deceased seaman,

and he brings the suit against the United States in his capacity as administrator.

Article 7 of the Second Seamen's War Risk Policy (Code of Federal Regulations, 1943 Supplement, Title 46, Chapter 3, App. A, pages 2129-30) provides in pertinent part:

"A. The insurance shall be payable only to a lawful widow or widower, child (the latter term including a posthumous child, a child legally adopted by the insured, and, if designated, a child in relation to whom the insured stood in *Loco parentis*, and a stepchild or acknowledged illegitimate child), parent (including a step-parent, parent by adoption and, if designated, a person who stood in the place of a parent to the insured), brother or sister (including, if designated, step-brothers or step-sisters, half-brothers and half-sisters, and brothers and sisters by adoption), grandparents, grandchildren, and, if designated, nephews, nieces, aunts or uncles, of the insured.

\* \* \*

(3) If the insured fails to designate a beneficiary or if the beneficiary or beneficiaries, whether primary or contingent, die before the insurance or any portion thereof shall be paid, the insurance will, subject to the provisions of paragraph B hereof, be paid to the beneficiary or beneficiaries within the following classes and in the order named:

\* \* \*

(c) If the insured shall have no lawful widow or widower of him or her surviving but shall have a child or children of him or her sur-

viving, 100 per cent to the child or children in equal shares.

\* \* \*

B. The right of any beneficiary to payment of the insurance, or any unpaid installment thereof, shall be conditioned upon his or her being alive to receive payment. No person shall have a vested right to any such insurance or any installment of any such insurance. *No insurance shall be paid to the heir or heirs or executors or administrators of the insured or of any beneficiary.*" (Italics supplied)

It is thus apparent that the Second Seamen's War Risk Policy not only directs payment of the insurance proceeds to certain designated beneficiaries but expressly prohibits payment to the administrator of the estate of the insured. The courts have often held that where the proceeds of an insurance policy are payable to a beneficiary, the administrator of the estate of the insured has no capacity to sue and on that ground his complaint will be dismissed. *Lee v. United States*, 101 F. (2d) 472; *Gordon v. United States*, 37 F. (2d) 925; *United States v. Boshar*, 91 F. (2d) 264. In *United States v. Lee*, supra, the administrator of the estate of the insured brought an action under Section 516, Title 38 U.S.C.A., which provided:

" \* \* \* That insurance hereafter revived under this section and section 516b of this title by reason of permanent and total disability or by

death of the insured, shall be paid only to the insured, his widow, child, or children, dependent mother or father, and in the order named unless otherwise designated by the insured, during his lifetime or by last will and testament. \* \* \*

The court dismissed the complaint holding that the administrator had no capacity to sue. The court said, after analyzing the statute and its legislative history, "This history shows that it was the clear intent of the Congress that only living persons were to be beneficiaries, and that no estate should be a beneficiary under this section. The omission of any reference to payment to an estate indicated that the privileges of the section were not intended for any other than the beneficiaries named in the class. Cf. *United States v. Madison*, 300 U.S. 500, 57 S. Ct. 566, 81 L. Ed. 767." (P. 474).

The contract of the Fireman's Fund Insurance Company in its policy was with "the assured, their Executors and Administrators" (Aps. 47). The insured did not designate a beneficiary and hence the proceeds of that policy are payable to the administrator of the estate of the insured. The administrator, therefore, may properly bring suit against the Fireman's Fund Insurance Company. With respect to the Second Seamen's War Risk Policy, however, the failure of the insured to designate a beneficiary

makes the proceeds of the policy payable, under Article 7, *supra*, to the insured's daughter Betty Jane Johnson Grant, and she alone can bring suit under the policy against the United States. She should, therefore, have been made a party to the action as permitted by Section 1128(d), Title 46 U.S.C.A., "All persons having or claiming to have an interest in such insurance, or who it is believed might assert such an interest may be made parties to such suit, either initially or upon motion of either party."

Since the administrator had no right to the proceeds of the Second Seamen's War Risk Policy, he had no capacity to sue, therefore, and his libel against the United States was properly dismissed.

## II

THE UNITED STATES IS NOT LIABLE ON THE SECOND SEAMEN'S WAR RISK POLICY SINCE THE DECEASED SEAMAN WAS ADEQUATELY PROTECTED BY THE POLICY ISSUED BY THE FIREMAN'S FUND INSURANCE COMPANY.

It is conceded by the libellant that the United States may be liable under the Second Seaman's War Risk Policy only if the deceased seaman did not have adequate coverage under the policy issued by

the Fireman's Fund Insurance Company (Aps. 72). The purpose of the Clarification Act (Section 1292, Title 50, War Appendix, Public Law 17, Chapter 26,) was to provide protection from war risks for seamen and their dependents who were "not otherwise adequately provided for." There is no question but that the Clarification Act was not intended to provide insurance additional to the private insurance which the seaman might have. If, then, it is determined that the Fireman's Fund policy covered the particular risk of war which resulted in the seaman's death, the United States cannot be liable on the Second Seamen's War Risk Policy.

The court below found that the death of Oscar Carl Johnson was a direct and proximate result of the warlike acts of the enemy Japanese and of the treatment suffered by the said seaman while a prisoner of war.

It is a well-established principle of admiralty law that the findings of fact by a trial court will not be disturbed unless clearly erroneous.

*Blake v. W. R. Chamberlin & Co.*, 176 F. (2d) 511 (C.C.A. 9);

*Fiamengo v. The San Francisco et al*, 172 F. (2d) 767 (C.C.A. 9);

*Hodges v. Standard Oil Co. of New Jersey*, 123 F. (2d) 362 (C.C.A. 4);

*Crist v. United States War Shipping Admin.*,  
163 F. (2d) 145 (C.C.A. 3);

*Virgin v. United States*, 165 F. (2d) 81  
(C.C.A. 4).

In *Blake v. W. R. Chamberlin & Co.*, supra, the court said:

In admiralty strong effect will be accorded the conclusion of the court from substantial evidence given by witnesses in court and weight will be accorded the court's conclusion where part of the evidence is by witnesses in court and part by depositions.

The case in the District Court at bar was not decided on depositions alone, but by depositions and the testimony of witnesses. The testimony of Dr. Frederick Slyfield (Aps. 94-104) was crucial to the determination of the issue of the proximate cause of death. The exception to the rule argued on pages 6 - 7 of appellant's brief is therefore, inapplicable to the instant case. Dr. Slyfield testified that if a rib resection operation could have been performed on the seaman under normal conditions he would have had a two to one chance of recovery. (Aps. 99) Carl Olaf Dreyer the Master of the CAPILLO testified that he lost nearly 60 pounds in weight, from 180 to 121 pounds, while a prisoner due to malnutrition. In the face of this testimony it can hardly be said that the finding of the District Court Judge, to the

effect that the death of Johnson resulted directly from his imprisonment was clearly erroneous.

### III

THE DECISIONS OF THE WAR SHIPPING ADMINISTRATION UNDER THE AUTHORITY LODGED IN IT TO DETERMINE COVERAGE UNDER SECOND SEAMEN'S WAR RISK POLICIES INVOLVE THE EXERCISE OF DISCRETION AND ARE NOT SUBJECT TO REVIEW BY THE COURTS.

The Merchant Marine Act of 1936 (Sections 1128 to 1128h, inclusive, Title 46 U.S.C.) is the basic statutory authority for granting insurance benefits to crew members of American vessels. Subsections (d) and (e) of Section 1128a and subsection (a) of Section 1292, Title 50, U.S.C. define the insurance benefits which the United States Maritime Commission is authorized to write for and on behalf of the masters, officers and crew members of American vessels. Subsection (b) of Section 1292, Title 50 U.S.C. apparently extends the provisions of the Second Seamen's War Risk Policy to seamen suffering casualties prior to adoption of the policy in March 1943. It provides that insurance under the Merchant Marine Act of 1936, as amended by Subsection (a) of Section 1292, may be extended in the discretion

of the Administrator of the War Shipping Administration to masters, officers and members of the crew of American vessels for death, detention or other casualties suffered by them for the period from October 1, 1941, and before thirty (30) days after the date of the enactment of the subsection, which was enacted March 24, 1943.

The insurance authority conferred upon the Maritime Commission by the foregoing acts was transferred to the War Shipping Administration and the Administrator thereof by Executive Order No. 9054, promulgated February 7, 1942, as amended by Executive Order No. 9244, issued September 16, 1942, and by the provisions of Section 1295, Title 50 U.S.C. (Act of March 24, 1943, Chapter 26, Section 5, 57 Stat. 51). Since the promulgations of Executive Order No. 9054 the War Shipping Administration and the Administrator thereof have been charged with the sole authority and responsibility in administering all matters relating to merchant seamen's insurance benefits.

Section 1292(b), Title 50 U.S.C.A. provides that "The declarations, findings, and actions of or by the Administrator under this subsection shall be final and conclusive." Article 10 of the Second Seamen's War Risk Policy provides: "Unless extended by the

provisions hereinafter contained, payment of the insurance for losses established in a manner *satisfactory to the Administrator or the Maritime War Emergency Board.*" (Emphasis supplied) Article 11 provides, "The time and facts of death of any insured shall be established in a manner *satisfactory to the Administrator.*" (Emphasis supplied.)

It is thus apparent that Congress intended to lodge complete discretion in the Administrator to determine coverage under the Second Seamen's War Risk Policy. It is well settled that where a statute makes the decisions of an administrative agency final and conclusive, the courts will not review the agency's decisions, at least when they are not arbitrary and capricious.

*Silberschein v. United States*, 266 U.S. 221;  
*Dismuke v. United States*, 297 U.S. 167.

It should be emphasized that the protection granted under the Clarification Act (Sec. 1292(b)) is automatic and gratuitous, the seaman paying no premium for the policy. Furthermore, the coverage is made retroactive to voyages begun before the passage of the Act, "if the Administrator finds that such action is required to make equitable provision for loss or injury related to the war effort and not otherwise adequately provided for." Under such cir-

cumstances, no property or constitutional right of the seaman is invaded in delegating to the Administrator alone authority to make decisions as to coverage.

By memorandum decision, dated July 7, 1943, the Administrator promulgated the following policy with respect to death claims under the Second Seamen's War Risk Policy:

- "3. Death cases must involve the existence of a bona fide relationship between the deceased and the beneficiary within the limits specified in Article 7 of the Second Seamen's War Risk Policy, and no payment shall be made to a person who fails to qualify under that Article. If the seaman involved has named as a beneficiary under the crew war risk insurance in force at the time of loss a person within said limits, payment shall be made to such designee, dependency being presumed, otherwise payment may be made to any person within such limits who is proven to be a bona fide dependent. In the event there is more than one dependent within such limits the distribution of benefit among such dependents shall be guided by the provisions of Article 7 A (3) of the Second Seamen's War Risk Policy. In the absence of either a valid designee or proven dependency, payment may be made to any person within said limits with whom the seaman made his home, dependency being presumed. Any findings made by the Administrator leading to payment as aforesaid shall be deemed conclusive as against all claimants."

In accordance with the above-quoted policy, the Administrator denied the claim of the beneficiary on the ground that she was not a dependent of the insured. The discretion thus exercised by the Administrator in limiting the benefits of automatic, gratuitous insurance is in accordance with the intent of Congress as appears from the report of the Senate Committee on Commerce, page 213, U.S. Code, Congressional Service, 78th Congress, 1st Session, 1943, wherein it is stated:

“Insurance protection for seamen — Another problem primarily affecting *seamen and their dependents* is the need of providing more complete protection to *seamen and their dependents* in case of loss or bodily injury to such seamen \* \* \*.” (Italics supplied)

Thus, assuming arguendo, that the Fireman's Fund Insurance Company is not liable on its policy, the administrator of the estate of the insured cannot recover against the United States since the Administrator of the War Shipping Board has determined in the exercise of the discretion delegated to him by law that the beneficiary is not a dependent of the insured and hence, not within the coverage of the Second Seamen's War Risk Policy.

## CONCLUSION

For the reasons mentioned, it is respectfully submitted that the libel was properly dismissed against the United States and that the judgment of the court should be affirmed.

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